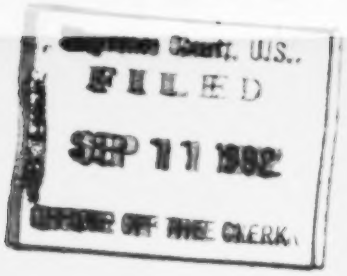
92-444



CASE NO. _____

SUPREME COURT OF THE UNITED STATES OF AMERICA

October 1992 Term

UNITED STATES OF AMERICA

Respondent

vs.

FRANK R. FATO, SR.

Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN G. JORY
Counsel of Record
JORY & SMITH
P. O. Box 1909
Elkins, WV 26241
304-636-3553

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in denying Petitioner his right to an appeal from a conviction in the United States District Court for the Northern District of West Virginia because Petitioner failed to report for sentencing and for service of his sentence, even though he voluntarily surrendered only four months later?

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STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner is seeking review of an Order entered June 16, 1992 by the United States Court of Appeals for the Fourth Circuit, wherein that Court denied Petitioner's Motion for Reconsideration of the denial of his Motion for Reinstatement of Appeal. Pursuant to Title 28 United States Code §1254(1) this Court has jurisdiction, by a petition for writ of certiorari to review the Fourth Circuit's decree.

CONSTITUTIONAL PROVISIONS, STATUES AND RULES INVOLVED IN THIS CASE

I. Amendment VIII, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

II. Amendment XIV, Section 1, United States Constitution

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. 28 United States Code, §1254(1), Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

IV. Rule 3, Federal Rules of Appellate Procedure

An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to

take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal...

STATEMENT OF THE CASE

Pursuant to an indictment captioned United States of America v. Frank R. Fato, Sr., Criminal No. 90-160, filed in the United States District Court for the Northern District of West Virginia on November 15, 1990, the Petitioner, Frank R. Fato, Sr., was charged with violation of Title 18, United States Code, §371 (conspiracy to defraud or commit an offense against the United States); Title 18, United States Code §1952(a)(3) and (b) (interstate travel in aid of racketeering); and Title 18, United States Code, §1343 (wire fraud). These charges arose out of an arson committed on property owned by the Petitioner and located in the State of Maryland.

After a three-day trial in which he denied any involvement, Petitioner was convicted on October 10, 1991, of those charges set forth in the November 15, 1990 indictment. Petitioner, having been released on a $10,000.00 unsecured bond, failed to appear for sentencing which was scheduled for January 6, 1992. Petitioner was sentenced in abstencia and subsequent thereto, a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit was timely filed by counsel on behalf of Petitioner on January 13, 1992. By correspondence dated January 27, 1992, counsel for the respective parties were advised that pursuant to Estelle, Corrections Director v. Dorrough, 420 U.S. 534, 537 (1975), it was the Circuit Court of Appeals' practice to dismiss the appeal of an escaped "prisoner" with leave to the appellant to move for reinstatement of the appeal at a future date for good cause shown. Thereafter, pursuant to an Order dated February 6, 1992, the appeal was dismissed with

leave to move for reinstatement at a future date.

On April 21, 1992, the Petitioner voluntarily surrendered to the custody of the United States and filed a Motion for Reinstatement of Appeal on May 1, 1992. The Government filed a response on May 11, 1992 and a reply was filed by the Petitioner on May 18, 1992; however, the Circuit Court of Appeals entered an Order on the same date denying reinstatement of the appeal without having an opportunity to review the reply. Therefore, Petitioner filed a Motion for Reconsideration, setting forth among other things, the fact that the two documents apparently crossed in the mail and that the circumstances set forth in the reply compelled a reconsideration of the Motion.

On June 16, 1992, a Deputy Clerk of the Fourth Circuit Court of Appeals entered an Order denying the Motion for Reconsideration. Neither the Order denying the Motion for Reinstatement nor the Order denying the Motion

for Reconsideration set forth any reason for the denial. Petitioner comes before this Court, on a petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit's denial of his right to an appeal from the October 1991 conviction.

ARGUMENT

The Fourth Circuit Court of Appeal's denial of the Petitioner's right to an appeal from his conviction in the Northern District of West Virginia based upon his failure to appear for sentencing was the result of an improper interpretation and modification of this Court's ruling in Estelle, Corrections Director v. Dorrough, 420 U.S. 534 (1975) wherein this Court upheld a Texas statute permitting the dismissal of an appeal by a felony defendant if he escaped from custody pending the appeal. The Texas statute also provided for reinstatement of the appeal if the defendant voluntarily surrendered within certain prescribed time periods and prisoners who had not invoked the appellate

process prior to their escape could appeal after recapture if applicable appellate time limits had not run.

In the instant case, Petitioner fled prior to sentencing, but a timely Notice of Appeal was filed by his counsel. Rule 3, Federal Rules of Appellate Procedure, provides in pertinent part that one convicted of a crime in a district court may appeal, as of right, to a court of appeals for that district. However, the Circuit Court of Appeals has instituted a policy, apparently based upon Estelle, whereby appeals are dismissed if the appellant has fled the custody of the United States or violated the conditions of his bond.

Although there was a specific Texas statute providing the basis for denial of an appeal in Estelle, there is no statute providing guidance or justification for the position taken by the Fourth Circuit. More importantly, the decision seems to be in conflict with a prior decision of that Court. In U.S. v. Sellers, 621

F.2d 101 (4th Cir. 1980) the Court reinstated the appeal of a prisoner who had escaped during the pendency of his appeal and remained a fugitive for approximately 27 months. In the instant case, Petitioner escaped prior to his appeal and only remained a fugitive from January 6, 1992, until his voluntary surrender on April 21, 1992.

Since the Orders do not disclose any basis for the Court's decision, it appears that the Fourth Circuit Court of Appeals may have accepted the Government's contention that the Petitioner had abandoned his right to an appeal. However, this is an impossible scenario because the Petitioner was never given the opportunity to pursue an appeal since he became a fugitive prior to commencement of the appellate process. Furthermore, to punish someone by prohibiting an appeal is unnecessary under our modern system of jurisprudence. Petitioner has already received two potential forms of punishment for his failure to appear for sentencing. Namely,

Petitioner received a 10 month enhancement of his sentence pursuant to Section 3C1.1 of the United States Sentencing Guidelines and he was indicted on April 14, 1992, for failure to appear for sentencing, a violation of Title 18 U.S.C. §3146(a)(1). Petitioner submits that those factors provide adequate punishment for his actions and the denial of his appellate right constitutes a violation of the 8th Amendment's prohibition against excessive fines and the infliction of cruel and unusual punishment, as well as being violation of the 14th Amendment's equal protection clause.

In U.S. v. Smith, 544 F.2d 832 (5th Cir. 1977), a case relied upon by the Government in its opposition to Petitioner's Motion for Reinstatement of his Appeal, Smith was denied his right to an appeal because he "jumped bond" while the appeal was pending. Unlike the Petitioner in the instant case, he had been given the opportunity to pursue his appeal and by his actions, abandoned the appeal. The

logical conclusion is that one must be given the opportunity to pursue an appeal before it can be abandoned. Accordingly, Petitioner ought to be permitted to pursue his appeal.

As set forth above, the Order dismissing Petitioner's appeal with the right to move for reinstatement did not refer to any particular statute or court rule. Furthermore, the Order did not provide for a specific time within which Petitioner must surrender as a prerequisite for reinstatement. The Order merely provided that the appeal could be reinstated at a later date for good cause shown. (Petitioner submits that good cause was established in his motions filed with the Circuit Court of Appeals.) The Fourth Circuit Court of Appeals has, however, provided specific time limitations pertaining to surrender in other cases. For example, in In Re: Special Grand Jury, 697 F.2d 112 (4th Cir. 1982), the Court specifically provided that reinstatement

would be granted only if the fugitive, appellant surrendered within thirty days.

The authority more directly on point is clearly United States v. Sellers, 621 F.2d 101 (4th Cir. 1980) wherein the Court allowed reinstatement after 27 months despite the fact that the Appellant fled during the pendency of the appeal. Petitioner submits that the purpose for dismissal in both Sellers and the instant case was for judicial economy. It would seem to be a waste of resources to institute an appeal which may ultimately result in a reversal and/or remand of the case when the Defendant is a fugitive. Upon surrender or capture, the appeal should be reinstated as occurred in Sellers. However, the Circuit Court of Appeals has chosen to disregard its own precedent and deny the Petitioner equal protection of the law as required by the Fourteenth Amendment to the United States Constitution.

In sum, the Petitioner was never given an opportunity to pursue his appeal, unlike

other appellants who have abandoned their right to an appeal by fleeing the jurisdiction during the pendency of the appeal. The Fourth Circuit's decision is in conflict with its own authority and is based upon an incorrect interpretation of this Court's authority. Furthermore, the appellate court's refusal to consider Petitioner's reply brief which was filed on the same day as the Court's order is a miscarriage of justice. Accordingly, this Court should consider this Petition for writ of certiorari and direct the Fourth Circuit Court of Appeals to reinstate the appeal.

CONCLUSION

Petitioner was improperly denied his right to appeal to the United States Court of Appeals from his criminal conviction in the district court. A writ of certiorari should issue so that this Court may review the entire record and remand the action with directions to reinstate the appeal.

Respectfully submitted,

FRANK F. FATO, SR.,
Petitioner

By Counsel

STEPHEN G. JORY
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(304)636-3553

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

JOHN M. GREACEN
Clerk

TELEPHONE
(804) 771-2213
FTS 925-2213

January 27, 1992

Stephen Godfrey Jory, Esq.
1 Randolph Avenue
P. O. Box 1909
Elkins, WV 26241

Samuel Gerald Nazarro Jr., Esq.
OFFICE OF THE U. S. ATTORNEY
P. O. Box 591
Wheeling, WV 26003

Re: 92-5046 US v. Fato
CR-90-160

Dear Counsel:

The appeal was docketed in this Court on 1/27/92 pursuant to Rule 12(a) of the Federal Rules of Appellate Procedure. Docket number 92-5046 should be placed on all papers subsequently submitted to this Court.

We have received notice from the District Court that the appellant, Frank R. Fato, Sr., failed to commence his prison term.

Pursuant to Estelle v. Dorrough, 420 U.S. 534, 537 (1975), it is this Court's practice to dismiss the appeal of an escaped prisoner with

leave to the appellant to move for reinstatement of the appeal at a future date for good cause shown.

Before the appeal can be dismissed, however, we must have confirmation from the government and appellant's counsel that the appellant has not been apprehended and is still at large. Once the confirmation is received, the appeal will be dismissed.

Counsel for both sides are requested to respond to this letter on or before February 6, 1992.

If you desire to inquire about your case by telephone, please contact me directly by dialing (804) 771-2359.

Yours truly,

JOHN M. GREACEN
Clerk

By: AMY M. CHURCH
Deputy Clerk

cc: Randy Belsvik

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 6, 1992

No. 92-5046
CR-90-160

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK R. FATO, SR.

Defendant - Appellant

O R D E R

The Court having determined that the appellant has escaped from custody,

IT IS ORDERED that the appeal is dismissed with leave to the appellant to move for reinstatement of said appeal at a future date for good cause shown.

FOR THE COURT - BY DIRECTION

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 18, 1992

No. 92-5046
CR-90-160

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK R. FATO, SR.

Defendant - Appellant

O R D E R

Appellant has filed a motion to reinstate this appeal and the government has filed a response in opposition to the motion.

The Court denies the motion for reinstatement of appeal.

FOR THE COURT,

/s/ Bert M. Montague

ACTING CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 16, 1992

No. 92-5046
CR-90-160

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK R. FATO, SR.

Defendant - Appellant

O R D E R

Appellant has filed a motion for reconsideration of his motion for reinstatement of appeal and the government has filed a response in opposition to the motion.

The Court denies the motion for reconsideration of his motion for reinstatement of appeal

FOR THE COURT - BY DIRECTION

BERT M. MONTAGUE
Clerk

Supreme Court, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

No. 92-444

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK R. FATO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
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QUESTION PRESENTED

Whether the court of appeals properly dismissed an appeal by a defendant who fled before sentencing and remained a fugitive during the pendency of his appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-444

FRANK R. FATO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals dismissing petitioner's appeal (Pet. App. 16) and denying reinstatement of petitioner's appeal (Pet. App. 17) are unreported.

JURISDICTION

The order of the court of appeals denying reinstatement of petitioner's appeal was entered on May 18, 1992. A motion for reconsideration was denied on June 16, 1992. The petition for a writ of certiorari was filed on September 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. 371; interstate travel in aid of the commission of arson, in violation of 18 U.S.C. 1952(a)(3); and wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to 51 months' imprisonment, to be followed by three years of supervised release, and fined $75,000. Petitioner also was ordered to pay restitution of $210,958.89.

1. Petitioner is the owner and operator of a mobile home business near Buckhannon, West Virginia. In December 1989, he moved from his residence in Glenwood, Maryland, to a new residence in Brookeville, Maryland. Shortly thereafter, petitioner arranged for an employee, Dana Butcher, to burn his former residence, which was insured for $360,000 against fire loss by Hartford Insurance Company. On December 31, 1989, Butcher traveled from West Virginia to Glenwood, Maryland, and set afire petitioner's former residence with diesel fuel and lighter fluid. Two days later, petitioner telephoned his insurance agent in Maryland to initiate a claim for the loss of his former residence. Gov't Version of Offense 1-2 (attached to presentence investigation report).

The state fire marshal ultimately determined that arson was the cause of the fire at petitioner's residence. When petitioner refused to provide a statement under oath, the insurance company denied payment of petitioner's claim in accordance with the terms of the insurance policy. The insurance company, however, paid $210,958.89 to two mortgagees of petitioner's former res-

idence. Gov't Version of Offense 3-4 (attached to presentence investigation report).

2. After being convicted by a jury, petitioner failed to appear for his sentencing on January 6, 1992. His counsel told the district court: "[Petitioner is] not intending to be present today. * * * [I]t is his message to the court that he feels he did not receive justice and a fair trial and felt that he had to leave for those reasons." 1/6/92 Tr. 2. The district court sentenced petitioner *in absentia* and issued a warrant for petitioner's arrest.

3. While petitioner remained a fugitive, his counsel filed a notice of appeal on January 13, 1992. Two weeks later, the court of appeals sent a letter to the parties stating that it was the court's "practice" to dismiss the appeal of an escaped prisoner pursuant to *Estelle* v. *Dorrough*, 420 U.S. 534 (1975). Pet. App. 14-15. The court asked the parties to confirm whether petitioner was still a fugitive. *Id.* at 15. In a letter dated February 3, 1992, the government advised the court that petitioner "has not yet been apprehended and his whereabouts are, at the present, unknown." Three days later, on February 6, the court of appeals dismissed petitioner's appeal with leave to move for reinstatement of the appeal at a future date for good cause shown. Pet. App. 16.

Two and one half months after his appeal was dismissed, petitioner voluntarily surrendered on April 21, 1992. Shortly thereafter, he moved to reinstate his appeal. The court of appeals denied the motion. Pet. App. 17. The court likewise denied petitioner's motion for reconsideration. *Id.* at 18.

ARGUMENT

Petitioner contends that the court of appeals erred by dismissing his appeal and refusing to reinstate it. Pet. 6-12.

1. Petitioner was a fugitive when his appeal was dismissed in this case. It is well settled that appellate courts may dismiss a pending appeal when the defendant is a fugitive. See *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975) (per curiam) (noting that "[d]isposition by dismissal of pending appeals of escaped prisoners is a long-standing and established principle of American law"). Moreover, under this Court's cases, appellate courts are not required to reinstate a dismissed appeal when a fleeing defendant is later recaptured and taken into custody.

In *Allen* v. *Georgia*, 166 U.S. 138, 142 (1897), this Court ruled that, after a fugitive defendant was recaptured, the appellate court was under no obligation to reinstate an appeal that was dismissed while he was at large. Similarly, in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam), this Court declined to adjudicate the case of a defendant who fled after appealing his state conviction. The Court noted that the escape did not render the appeal moot. Rather, it "disentitle[d] the defendant to call upon the resources of the Court for the determination of his claims." *Id.* at 366. The Court went on to conclude that "[i]n the absence of specific provision to the contrary in the statute under which Molinaro appeals," the Court had inherent authority to dismiss the appeal. *Ibid.* The Court did not make the dismissal of the appeal in *Molinaro* contingent on the defendant's failure to return to custody by a certain date, nor did it indicate that the appeal would be reinstated under those circumstances. Rather, the Court made clear that an appellate court could respond to a defendant's fugitivity

during the pendency of an appeal by an immediate, unconditional dismissal of the appeal with prejudice, without regard to whether the defendant voluntarily returned or was recaptured. See also *United States* v. *Wright*, 902 F.2d 241, 243 (3d Cir. 1990); *United States* v. *Amado*, 754 F.2d 31, 32 (1st Cir. 1985); *United States* v. *Shelton*, 508 F.2d 797, 798-799 (5th Cir.), cert. denied, 423 U.S. 828 (1975). Indeed, the courts of appeals agree that a court may dismiss an appeal even after the defendant is recaptured and returned to custody during the pendency of the appeal. See, *e.g.*, *United States* v. *DeValle*, 894 F.2d 133, 135-136 (5th Cir. 1990); *United States* v. *Puzzanghera*, 820 F.2d 25, 26-27 (1st Cir.), cert. denied, 484 U.S. 900 (1987).

2. Although it is well settled that a court of appeals may dismiss the appeal of a defendant who was at large while his appeal was pending, the courts of appeals are divided on the issue of whether an appeal may be dismissed if a defendant flees and is recaptured and returned to custody before the appeal is filed. The Court recently agreed to resolve that question in *Ortega-Rodriguez* v. *United States*, cert. granted, 112 S. Ct. 2964 (June 15, 1992) (No. 91-7749).* Because the question

* Like this petitioner, the petitioner in *Ortega-Rodriguez* fled before sentencing and was sentenced *in absentia*. Unlike this petitioner, however, the petitioner in *Ortega-Rodriguez* did not file a notice of appeal. When he was later recaptured, the petitioner in *Ortega-Rodriguez* was resentenced, and he then appealed from the second sentence. Thus, the issue in *Ortega-Rodriguez* arises in the context of a defendant who flees and is recaptured before the appeal is filed.

The courts of appeals are divided over whether an appeal may be dismissed in those circumstances. In *United States* v. *Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), the court held that "a defendant who flees after conviction,

presented in *Ortega-Rodriguez* is quite distinct from the issue in this case, it is unlikely that this petitioner would be entitled to any relief even if the petitioner in *Ortega-Rodriguez* were to prevail. Therefore, there is no need for the Court to hold the petition in this case pending its decision in *Ortega-Rodriguez*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

NOVEMBER 1992

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but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." See also *United States* v. *Parrish*, 887 F.2d 1107, 1109 (D.C. Cir. 1989); *United States* v. *Persico*, 853 F.2d 134, 136-138 (2d Cir. 1988). In contrast, the First Circuit held in *United States* v. *Anagnos*, 853 F.2d 1, 2 (1988), that it was improper to dismiss the appeal of a recaptured defendant who fled after the conviction but was recaptured before being sentenced and filing an appeal. In *Anagnos*, the court drew a distinction between a defendant who had fled and was recaptured before sentencing and a defendant who fled and was recaptured after he appealed, acknowledging that it had previously ruled that it could dismiss the appeal of a defendant who fled during the pendency of the appeal and was subsequently returned to custody. See *United States* v. *Puzzanghera*, 820 F.2d at 26-27.